UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

ESTER HERNANDEZ, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 98B00090
ALLIED INSURANCE, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

(August 17, 1999)

I. INTRODUCTION

Complainant Ester Hernandez (hereinafter Complainant or Hernandez) has filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent Allied Insurance, Inc. (hereinafter Respondent or Allied) discriminated against her on the basis of her national origin by terminating her employment at Respondent. Presently pending is Respondent's Motion for Summary Decision which centers around Respondent's allegations that the Complaint should be dismissed because (1) this tribunal lacks jurisdiction over the Complaint, and (2) the undisputed evidence establishes that Complainant was not discriminated against on the basis of her national origin. See R's Mt. for Summ. Dec. at 1-2. For the reasons discussed below, I find that Respondent has demonstrated that it is entitled to judgment as a matter of law on the basis that this tribunal lacks jurisdiction over the Complaint.

II. BACKGROUND AND PROCEDURAL HISTORY

On September 15, 1997, Ester Hernandez and Rosa Gonzales filed charges with the Equal Employment Opportunity Office (EEOC) alleging that Respondent discriminated against them on the basis of their national origin. See Jt. Stips. of Fact ¶ 17. The EEOC thereafter referred such charges to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). See id. Hernandez and Gonzales then filed their separate Complaints with the OCAHO on September 11, 1998, alleging that Respondent knowingly or intentionally fired them because of their national origin, a violation of 8 U.S.C. § 1324b(a)(1). See id. ¶ 18. Complainant did not allege discrimination based on citizenship status or retaliation. See Compl. at 2, 5.

Respondent filed a letter in response to Hernandez and Gonzales' Complaints on

October 21, 1998. During a November 19, 1998, prehearing conference, I ordered Respondent to submit an Answer that responded to the specific allegations contained in the Complaints. I also consolidated Hernandez and Gonzales' cases pursuant to the OCAHO Rules of Practice and Procedure, 28 C.F.R. § 68.16 (1998), and Federal Rule of Civil Procedure 42(a).[1]

On December 10, 1998, I received a Notice of Appearance from Respondent's attorney, along with an Answer and its First Motion to Dismiss. This Motion to Dismiss was based upon the fact that Hernandez and Gonzales also filed charges with the EEOC that were based upon the same facts as their OSC charges. Therefore, Respondent argued, Hernandez and Gonzales were precluded from filing immigration-related unfair employment practices claims with the OSC. See First Mt. to Dismiss at 2.

In an order extending the time Complainant and Gonzales had to respond to Respondent's First Motion to Dismiss, I also directed them to file and serve on Respondent's attorney, copies of any correspondence received from the EEOC in regard to their EEOC filed charges. Hernandez was also ordered to state whether, and on what date, she received notice of her right-to-sue from the OSC, and if she had the receipt, to provide a copy. Gonzales was ordered to state whether she received notice from the OSC of her right-to-sue on April 7, 1998, and if not, on what date she did receive such notice.

Subsequently, on January 6, 1999, I received a copy of a letter from Hernandez and Gonzales addressed to Respondent's attorney, with an attached copy of a certified return receipt card. This was not considered to be a response to Respondent's First Motion to Dismiss. However, in a January 20, 1999, Order I denied Respondent's Motion to Dismiss.

On January 14, 1999, my office received correspondence dated January 12, 1999, from Jose Ruiz, who identified himself as the President of the League of United Latin American Citizens (LULAC). Neither Mr. Ruiz nor his organization was a complainant in this proceeding. In regard to the date that Hernandez received notice from the OSC, the correspondence included an assertion that she "did not receive her mail due to personal problems, lack of compatibility with her husband ... and a change of address." See LULAC Letter at 1. Mr. Ruiz also attached copies of certified return receipt cards addressed to Hernandez and copies of the OSC right-to-sue letter which indicate that the letter was returned and re-sent to her on several occasions. No mention of the date Gonzales received her OSC notice is made in the January 12, 1999, correspondence. However, Gonzales attached a copy of a certified return receipt card to her OCAHO complaint that indicated she did receive such notice on April 7, 1998.

At this point, I ordered Mr. Ruiz to enter a Notice of Appearance if he wished to represent

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[1] Certain portions of Part 68 of Title 28 of the Code of Federal Regulations have been amended. References to those amended portions of Part 68 are to the interim rule published in the Federal Register at Vol. 64, no. 29, page 7066. References to those portions not affected by the interim rules are to the 1998 volume of the Code of Federal Regulations.

Hernandez and Gonzales in this proceeding. I also warned him that his January 14, 1999, communication would be rejected if he did not file such Notice of Appearance before February 5, 1999. I did receive timely correspondence from Mr. Ruiz indicating that he did wish to represent Hernandez and Gonzales in this proceeding, and I accepted this correspondence as Mr. Ruiz's entry of appearance.

On February 22, 1999, my office received a Second Motion to Dismiss based upon Respondent's assertion that Hernandez and Gonzales did not file their Complaints with the OCAHO within ninety (90) days after receipt of the OSC's right-to-sue letters. Since Respondent submitted materials outside the pleadings for consideration of this Motion to Dismiss, I considered such motion as a Motion for Summary Decision. Because Gonzales received her OSC right-to-sue letter on April 7, 1998, the ninety day period to file her complaint ended on July 7, 1998 but she did not file her complaint until September 11, 1998. Therefore, on March 24, 1999, I granted Respondent's Motion in regard to Gonzales. However, because I concluded that there was a disputed factual issue with respect to the date that Hernandez received her OSC right-to-sue letter, I denied the Motion in regard to Hernandez.

After the dismissal of Gonzales as a complainant, the remaining parties filed their Joint Proposed Procedural Schedule which I adopted on April 14, 1999. In addition, a second prehearing conference was held on May 17, 1999, during which the hearing in this proceeding was set for September 20-21, to be held in Amarillo, Texas. Subsequent to this second prehearing conference, I received a Motion to Substitute Counsel for Mr. Ruiz and a Notice of Appearance from Nina Perales, Esq., Albert H. Kauffman, Esq., and Cynthia M. Cano, Esq., of the Mexican American Legal Defense and Education Fund, Inc. (MALDEF) based, in part, on the fact that they specialize in national origin discrimination.

At the same time, these attorneys also filed a Motion to Vacate or to Amend the Procedural Schedule. In these filings, Complainant stated that Nina Perales, Esq., would be lead counsel for Complainant. In a May 25, 1999, order, I granted the Motion to Substitute Counsel, designated Nina Perales, Esq., as lead counsel, and modified certain provisions of the Joint Proposed Procedural Schedule.

Thereafter, the parties filed their witness and exhibit lists. On July 16, 1999, the parties also filed their Joint Stipulations of Fact and Law. On July 19, 1999, I ordered the parties to submit their exhibits to my office by August 20, 1999, and to submit any objections to admissibility by August 27, 1999. Complainant also filed a Motion to Compel Production of Documents which I granted on July 27, 1999.

On July 23, 1999, Respondent filed its Motion for Summary Decision with Brief which is the basis of this Order. Complainant filed a Response on August 2, 1999. Initially, I note that in such Response, Complainant references several deposition transcript pages which are not included in its exhibits. Most notably, these include the following: References to page 86 of Linda Polk's deposition transcript, cited in the Response at page 4; references to pages 72-73, 78-79, and 93 of Joan

Weigand's deposition transcript, cited in the Response at pages 4, 6; references to page 65 of Dawn Merriott's deposition transcript, cited in the Response at page 5; and references to page 61 of Ester Hernandez's deposition transcript, cited in the Response at page 9. Since these pages were not included in Complainant's submissions, I have not considered them in reaching this decision. However, I do receive in evidence the deposition pages attached to Respondent's Motion and Complainant's Response. Further, pursuant to 28 C.F.R. § 68.47 (1998), I receive in evidence the Joint Stipulations of Fact and Law.

III. SUMMARY DECISION STANDARDS

Respondent has moved for summary decision, maintaining that this proceeding should be dismissed because (1) this tribunal lacks jurisdiction to hear the Complaint, and (2) the undisputed evidence establishes that Complainant was not discriminated against on the basis of her national origin. See R's Mt. for Summ. Dec. at 1-2. Respondent has introduced, along with its Motion and Brief, numerous exhibits falling outside the four corners of the pleadings. In its response, Complainant also has submitted evidentiary materials (e.g. excerpts from depositions). Since both parties have submitted evidentiary materials and other matters outside the pleadings, it is appropriate to treat the jurisdictional issue under summary judgment standards. Reynolds v. Southern Management Inc., 856 F. Supp. 618, 619-20 (W.D. Okla. 1994) (stating that it is appropriate to consider lack of subject matter jurisdiction under summary judgment standards when the jurisdictional issue is intertwined with the merits of the case and both parties have submitted evidentiary materials outside the pleadings); EEOC v. New Cherokee Corp., 829 F. Supp. 73, 76-77 (S.D.N.Y. 1993)

The OCAHO Rules authorize Administrative Law Judges (ALJs) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066, 7078 (1999) (to be codified at 28 C.F.R. § 68.38(c)). This OCAHO Rule is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before federal district courts. Although OCAHO does have its own procedural rules for cases arising under its jurisdiction, ALJs may reference analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding issues based on the rule governing OCAHO proceedings. As such, Rule 56(c) and federal case law interpreting it are useful in determining whether summary decision is appropriate under the OCAHO Rules. See United States v. Aid Maintenance Co., 6 OCAHO 810 , 813 (Ref. No. 893) (1996), 1996 WL 735954, at *3, (citing Mackentire v. Ricoh Corp., 5 OCAHO 191, 193 (Ref. No. 746) (1995), 1995 WL 367112, at *2, and Alvarez v. Interstate Highway Constr., 3 OCAHO 399, 405 (Ref. No. 430) (1992), 1992 WL 535567, at *5); United States v. Tri Component Product Corp., 5 OCAHO 765, 767 (Ref. No. 821) (1995), 1995 WL 813122, at *3 (citing same).

As stated above, in deciding whether to grant a summary decision, I must decide if there are genuine issues of material fact in question. For this purpose, a fact is material if it might affect the

outcome of the case. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Additionally, an issue of material fact must have a "real basis in the record" to be genuine. Tri Component, 5 OCAHO 765, 768 (1995) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In determining whether that burden has been met, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. See Matsushita, 475 U.S. at 587 (1986). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. See United States v. Alvand, Inc., 1 OCAHO 1958, 1959 (Ref. No. 296) (1991), 1991 WL 717207, at * 1-2 (citing Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)). More specifically, the moving party is entitled to summary judgment "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita, 475 U.S. at 587 (1986).

After the moving party has met its initial burden, the burden then shifts to the non-moving party to set forth "specific facts showing that there is a genuine issue for trial." Tri Component, 5 OCAHO 765, 768 (1995) (quoting Fed. R. Civ. P. 56 (e)). Thus, when a motion for summary decision is supported and the moving party has met its initial burden, the non-moving party cannot rely on denials contained within the pleadings in opposing the motion. The Code of Federal Regulations specifically provides the following:

> When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such a pleading. Such a response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. at 7078-99 (to be codified at 28 C.F.R. § 68.38(b)). If the non-moving party fails to provide such specific facts, summary decision, if appropriate, shall be granted against the non-moving party. See id.; Fed. R. Civ. P. 56(e).

IV. ANALYSIS

A. Retaliation Allegation

In a footnote within its Response to Respondent's Motion for Summary Decision, Complainant alleges that in addition to her allegation of discriminatory discharge, she is also maintaining she was retaliated against for opposing Respondent's English-only policy, a violation of 8 U.S.C. § 1324b(a)(5). See C's Resp. to R's Mt. for Summ. Dec. at 8 n.1. Complainant acknowledges that she did not allege such claim in her Complaint. " Although Ester Hernandez did not check the space on her OCAHO Complaint form related to retaliation for filing a complaint, she

nevertheless maintains that she was retaliated against by her employer for opposing a policy she believed was discriminatory." Id. In fact, Complainant drew a line through the portion of her form Complaint regarding retaliation. See Compl. at 5. Thus, the addition of a retaliation claim would require amending her Complaint.

While the Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. at 7074-75 (to be codified at 28 C.F.R. § 68.9(e)), state that an ALJ may allow for the amendment of complaints at any time, Complainant has not moved to amend the complaint in this instance. Instead, she simply maintains that even though she did not allege a retaliation claim in her Complaint, she is now doing so. I note that without amending the Complaint, the consideration of such claim would be unduly prejudicial to the Respondent at this stage of the proceeding. For instance, Respondent has not even had the chance to admit or deny the charge. There being no motion to amend the Complaint, I will not address Complainant's discussion of retaliation under section 1324b(a)(5) and will adjudicate this Motion on the basis of the current Complaint.

B. Jurisdiction

Before addressing the issue of whether Respondent has met its burden in establishing that Respondent did not discriminate against Complainant on the basis of her national origin, it is first necessary to determine whether this tribunal has subject matter jurisdiction over this proceeding. Essentially, Respondent alleges that the antidiscrimination provisions of 8 U.S.C. § 1324b(a)(1) only apply to employers who have four or more employees at the time an alleged discriminatory act occurs. See R's Mt. for Summ. Dec. at 1-2. Both parties agree that 8 U.S.C. § 1324b only applies to persons or other entities that employ four or more employees, as provided in 8 U.S.C. § 1324b(a)(2). See Jt. Stips. of Law ¶ 3. Respondent argues that since the undisputed evidence establishes that Respondent had only three employees at the time the alleged discriminatory act took place, (the day Complainant's employment with Respondent ended), this tribunal lacks subject matter jurisdiction over this proceeding. See R's Mt. for Summ. Dec. at 6.

1. Exclusions to 8 U.S.C. § 1324b(a)(1) Coverage

The statutory section on which Complainant relies, 8 U.S.C. § 1324b(a)(1), establishes generally that it is an unfair immigration-related employment practice for a person or other entity to discriminate against an individual with respect to hiring, recruitment or referral for a fee, or discharge with respect to their national origin or citizenship. Another provision of such statute, 8 U.S.C. § 1324b(a)(2), delineates the entities that are excluded from coverage under section 1324b(a)(1). Among those excluded are "employers with three or fewer employees..." 8 U.S.C. § 1324b(a)(2)(A). In addition, with regard to national origin claims, this statutory exemption provision also excludes from coverage those employers covered under section 703 of title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2). See 8 U.S.C. § 1324b(a)(2)(B). Essentially, this provision excludes those employers who have 15 or more employees. See id.

Accordingly, the OCAHO's jurisdiction over national origin claims is limited to situations where the employer charged with discrimination employs more than three but less than fifteen

employees. See Hammoudeh v. Rush-Presbyterian-St. Luke's Medical Ctr., 8 OCAHO 1015, at 4-5 (1999), 1998 WL 108948, at *8 (Order Dismissing National Origin Discrimination Claim, Denying Complainant's Motion and Inquiring Further); Caspi v. Trigild, 6 OCAHO 957, 963 (Ref. No. 907) (1997), 1997 WL 131354, at *5 (Request to the Office of Special Counsel to Provide Information and Comment); Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 784, 797 (Ref. No. 892) (1996), 1996 WL 670179, at *9, aff'd, No. 96-3688 (3d Cir. 1997); Mendez v. Daniels, 2 OCAHO 739, 744 (Ref. No. 392) (1991), 1991 WL 531903, at *4; Ndusorouwa v. Prepared Foods, Inc., 1 OCAHO 1277, 1281 (Ref. No. 192) (1990); 1990 WL 512149, at *3. The issue in this order involves whether Respondent employed three or fewer employees. Thus, it is necessary to determine the appropriate method and time period for counting Respondent's employees.

2. Counting Employees for Jurisdictional Purposes

The EEOC and the OSC use two different methods in counting the number of employees an employer has for purposes of national origin claim jurisdiction. Title VII, the statute governing national origin discrimination claims before the EEOC, instructs the EEOC to count the number of employees for each working day in each of twenty or more calendar weeks. It specifically directs that the number of employees be assessed in the current or preceding calendar year, with the "current" year being defined as the year in which the alleged act of discrimination occurred. See 42 U.S.C. § 2000e(b). If the number of employees under this calculation is 15 or more, the EEOC has jurisdiction over such claim.

Respondent states that unlike title VII, 8 U.S.C. § 1324b "does not specify the time period within which an employer's number of employees is to be measured." See C's Resp. to R's Mt. for Summ. Dec. at 10. While the statute itself is not instructive, the explanatory note accompanying the regulations implementing 8 U.S.C. § 1324b and the regulations themselves, instruct the OSC to count employees on the date that the alleged discriminatory act takes place.

> Unlike title VII, [8 U.S.C. § 1324b] does not contain the 20 calendar week durational minimum. In light of the language and legislative history of [8 U.S.C. § 1324b], the Special Counsel will calculate the number of employees ... by counting all part-time and full-time employees employed on the date that the alleged discrimination occurred."

Supplementary Information, 52 Fed. Reg. 37402, 37402 (1987) (codified at 28 C.F.R. Part 44.200) (emphasis added); see also 28 C.F.R. § 44.101(a)(9) (1998) (describing a "charge" as an oath or affirmation that "[i]ndicates, if possible, the number of persons employed on the date of the alleged discrimination by the person or entity against whom the charge is by made") (emphasis added). In addition, OCAHO case law also establishes that the appropriate time for counting an employer's employees is on the day the alleged discriminatory act takes place. See Caspi, 6 OCAHO at 963. Since the appropriate time period for counting Respondent's employees is on the date the alleged discrimination occurred, the next step in this process is to determine the date on which Complainant's alleged discrimination occurred.

3. Date Alleged Discrimination Occurred

Respondent argues that July 21, 1997, is the date on which the alleged discrimination took place. See R's Mt. for Summ. Dec. at 5. Conversely, Complainant argues that the date or dates (July 18, 1997) on which the necessary acts leading up to Complainant's firing, termination, and employment ending date (the presentation of the handwritten English-only memorandum, the refusal to sign, the protestations that the request was wrong and unfair, and the last day of actual paid work) occurred is the date on which the alleged discrimination took place. See C's Resp. to R's Mt. for Summ. Dec. at 9-10.

As stated, Complainant's allegation is that she was knowingly or intentionally fired by Respondent on the basis of her national origin. See Compl. at 4. (Although the parties dispute whether Complainant was fired or she quit, for purposes of this discussion, I will assume Complainant was fired.) While Complainant listed July 18, 1997, as the date she was fired in her Complaint, she has since alleged that she was actually fired, terminated, or that her employment ended on July 21, 1997. For example, after conducting a First Prehearing Conference, she submitted a statement explaining that the July 18, 1997, date was incorrect. Instead, she stated that she did go back to work on July 21, 1997, and also stated,

> Mr. Polk took me to Mrs. Polks office and asked me if I was going to sign the memo. I told him what he was doing was not right so he handed me my paycheck and told me to go make my rules at my next job. I hope the misinformed information I gave will not be held against us in this case.

See December 9, 1998 Letter from Ester Hernandez. More importantly, Complainant admitted in the parties' Joint Stipulations of Facts and Law that her employment with Respondent ended on July 21, 1997 and that Rosa Gonzales' employment ended on July 19, 1997. See Jt. Stips. of Fact ¶¶ 15, 16.

In its Response to Respondent's Motion for Summary Decision, Complainant does not directly dispute that it jointly stipulated that Complainant's employment with Respondent ended on July 21, 1997. See C's Resp. to R's Mt. for Summ. Dec. at 2. In fact, while Complainant's Response is somewhat inconsistent, Complainant admits she was fired on such date. See id. ("Second, Respondent cannot rely on the fact that it fired Rosa Gonzales on a Saturday [July 19, 1997] to escape the non-discrimination requirements of 8 U.S.C. § 1324b in its firing of Ester Hernandez on the following Monday [July 21, 1997]" (emphasis added)). However, as stated above, Complainant argues that the number of employees Respondent has, for jurisdictional purposes, should be determined on July 18, 1997, the day of the presentation of the English-only memorandum and the last day of actual work because to do otherwise, would create an anomalous result. See C's Resp. to R's Mt. for Summ. Dec. at 10.

As a matter of law, Complainant's argument does not have merit. The discriminatory acts covered under 8 U.S.C. § 1324b are hiring, discharging, or recruitment or referral for a fee.

Discrimination in the terms and conditions of employment is not covered. See Costigan v. Nynex, 6 OCAHO 1151, 1156-57 (Ref. No. 918) (1997), 1997 WL 242199, at *4; Horne v. Town of Hampstead, 6 OCAHO 941, 947-48 (Ref. No. 906) (1997); 1997 WL 131396, at *5; Tal v. M.L. Energia, 4 OCAHO 1012, 1027-29 (Ref. No. 705) (1994), 1994 WL 752347, at *11, petition for reh'g denied, No. 94-3690 (3d Cir. 1994), review denied, 66 F.3d 312 (3d Cir. 1995) (table)).

In fact, the explanatory note that was published in the Federal Register when the regulations implementing 8 U.S.C. § 1324b were promulgated makes it crystal clear that section 102 of the 1986 Act [8 U.S.C. § 1324b] "does not prohibit discrimination in compensation, promotions, or any term or condition of employment other than hiring, firing, and recruitment or referral for a fee." Supplemental Information, 52 Fed. Reg. at 37403 (emphasis added).

Before Complainant's discharge, none of the acts Complainant cites as being necessary to her eventual discharge were acts of discrimination cognizable under 8 U.S.C.§ 1324b(a)(1). Indeed, had Complainant continued in her employment and filed a complaint under 8 U.S.C. § 1324b regarding the English-only rule, and even if such rule, as implemented or applied, was discriminatory, this tribunal would have no authority to adjudicate that claim, since it would concern a "condition of employment." Only after Complainant was discharged was she able to make a claim cognizable under 8 U.S.C. § 1324b(a)(1). Thus, because Complainant's alleged discharge is the act of discrimination viable under the statute for jurisdictional purposes, the only appropriate time period on which to count Respondent's employees is on the day she was actually terminated and her employment ended.

OCAHO case law supports the proposition that when a complainant asserts she was discharged discriminatorily, the date on which her employment ended and she was fired/terminated is the date the alleged discrimination occurred and the appropriate date for determining whether the respondent has three or fewer employees. For example, in Caspi, 6 OCAHO at 962-63, Judge Thomas noted that the date on which the complainant's employment ended with the respondent was the appropriate operative period for assessing coverage for purposes of section 1324b jurisdiction.

Additionally, in Alvarez v. Interstate Highway Constr., 3 OCAHO 399 (Ref. No. 430) (1992), 1992 WL 53567, at *4, aff'd. sub nom., Alvarez v. OCAHO, 996 F.2d 310 (10th Cir. 1993), available at 1993 WL 213912 (unpublished), a proceeding involving failure to hire and discharge, Judge Schneider determined that because the respondent employed more than 15 employees on the date the complainant was terminated and on the date when the respondent failed to recall him, the OCAHO had no jurisdiction over the complaint of national origin discrimination. Further, I stated in Aguirre v. KDI American Prods., 6 OCAHO 632, 646 (Ref. No. 882) (1996), 1996 WL 637474, at *11, that for statute of limitations purposes, an alleged discriminatory discharge takes place when the employee is fired. Id. at 646.

4. Application

For the reasons stated above, I look to the day Complainant's employment ended in order to determine the number of Respondent's employees for the purpose of determining whether this tribunal lacks subject matter jurisdiction over this proceeding. As stated earlier, the parties have submitted a joint stipulation that lists the Complainant's employment as ending on July 21, 1997. See Jt. Stips. of Fact ¶ 16. In addition, Complainant has alleged she was fired/terminated and her employment ended on July 21, 1997, in a letter she submitted to this office and within her Response to Respondent's Motion for Summary Decision, as well. See December 9, 1998 Letter from Ester Hernandez; C's Resp. to R's Mt. for Summ. Dec. at 2. Nowhere on the face of her Complaint does Complainant allege that Respondent had four employees on July 21, 1997.

The fact that Complainant agreed to the date of July 21, 1997, in a joint stipulation is important as joint stipulations are in the nature of admissions and are binding on the parties under 28 C.F.R. § 68.47 (1998). Thus, even if Complainant had affirmatively disputed the July 21, 1997, date in its Response to Respondent's Motion for Summary Decision, the admission of such date in the Joint Stipulations would have bound Complainant.

The parties do not dispute that prior to Rosa Gonzales' dismissal on July 18, 1997, Respondent employed the following four employees: Rosa Gonzales, Ester Hernandez, Edna Cantu Mobley, and Joan Weigand. See Jt. Stips. of Fact ¶¶ 8, 15. As such, after Gonzales' dismissal, Respondent employed three individuals. There is no indication from either of the parties that Respondent hired any additional employees between July 18, 1997 and July 21, 1997. Thus, Respondent has established that on the date Complainant's employment ended, July 21, 1997, Respondent had three employees.

As a matter of law, section 1324b excludes from jurisdiction those employers with three or less employees. Therefore, I lack jurisdiction over Complainant's Complaint. There being no jurisdiction, there is no need for me to address or decide whether Respondent's English-only requirement, either in its implementation or application, or Respondent's requirement that only its Spanish speaking employees sign Respondent's memorandum (see R's Mt. for Summ. Dec., Exh. A) violates 8 U.S.C. § 1324b in regard to Complainant's alleged discharge.

IV. CONCLUSION

For the foregoing reasons, Respondent's Motion for Summary Decision is granted. The hearing scheduled in Amarillo, Texas for September 20-21, 1999 is canceled.

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

NOTICE CONCERNING APPEAL

This is a final order. As provided by statute, not later than 60 days after entry of a final order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); Rules of Practice and Procedure for Administrative Hearings, 64 Fed. Reg. 7066, 7083 (1999) (to be codified at 28 C.F.R. § 68.57).

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 1999, I have served the foregoing Order Granting Respondent's Motion for Summary Decision on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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